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In The

Supreme Court of the United States

October Term, 1974

No. 74-986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

v.

EARLE G. PAYNTER, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 6, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, The Chesapeake and Ohio Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 24, 1974, in which rehearing was denied on December 6, 1974, affirming judgment of the United States District Court for the Western District of Virginia entered December 13, 1973.

OPINION BELOW

The two sentence *per curiam* opinion of the Court of Appeals (R. 3-4), not yet reported, and judgment on the peti-

tion for rehearing *en banc* (R. 1), appear in Appendix B herewith (infra, pp. 18-19). No opinion was rendered by the District Court for the Western District of Virginia. The written ruling of the District Court on the railroad's motion to dismiss this action because barred by 45 U.S.C. § 56 and its final judgment (Joint Appendix with Record, pp. 43-44, 69), appear in Appendix B herewith (*infra*, pp. 20-23).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 24, 1974. A timely petition for rehearing *en banc* pursuant to Rule 35 Federal Rules of Appellate Procedure was filed on November 6, 1974 and was denied on December 6, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 6(a), Federal Rules of Civil Procedure, extends the positive limitation for bringing an FELA action provided by 45 U.S.C. § 56 so that the action filed in this case on March 22, 1971 alleging an accident on March 19, 1968 is not barred by 45 U.S.C. § 56.

2. Whether the refusal of the District Court for the Western District of Virginia to enter final judgment for the C&O, or at least to grant a new trial, because of the insufficiency of evidence and the multitude of prejudicial error, and the two sentence *per curiam* affirmance of the District Court judgment thereon by the Court of Appeals for the Fourth Circuit constitute such a departure by the District Court from the accepted and usual course of judicial proceedings and the sanctioning of such departure by the Court

of Appeals as to deprive the petitioner of due process and call for the supervision of this Court.

STATUTORY PROVISIONS INVOLVED

1. Title 45, United States Code, § 56.

The statute provides that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

The full text of the statute appears in Appendix A herewith (*infra*, p. 17).

2. Title 28, United States Code, Federal Rules of Civil Procedure, Rule 6(a).

The rule provides that "In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the next day which is not a Saturday, a Sunday, or a legal holiday."

The full text of the rule appears in Appendix A herewith (*infra*, p 17).

STATEMENT OF THE CASE

This action was brought March 22, 1971 under 45 U.S.C., Chap. 2, Sect. 51-60 and 45 U.S.C., Chap. 1, Sects. 1-16, by a retired yard conductor of the petitioner claiming a low back strain when he ran and threw a switch in the Smith Creek Yard of the Chesapeake and Ohio Railroad at Clifton Forge, Virginia, about 1:00 p.m. during the morning work shift of March 19, 1968.

The district court refused not only final judgment for the C&O but also a new trial to correct the multitude of prejudicial errors appearing from the succeeding statement of the case. The Court of Appeals affirmed the district court judgment by the following *per curiam* opinion, the rehearing of which it also denied.

> "On consideration of the record, briefs and oral argument, we find no reversible error. We find sufficient evidence to take the case to the jury." (Appendix B, *infra*, p 19)

The transcript of the record in this case contains a printed Joint Appendix that includes all parts of the record in the District Court for the Western District of Virginia designated by both parties on the appeal from the judgment of that court to the Court of Appeals for the Fourth Circuit duly certified as a part of the record below pursuant to Rule 21(2) of this Court.

The Statement of the Case will be made in two parts because of the two Questions Presented, each part relating to that particular Question Presented. References to the printed Joint Appendix record will be made for convenience by the letters "J.A." and to the remainder of the certified record by the letter "R." The parties will be designated as "C&O" and "Paynter."

The Statement Relating To 45 U.S.C. § 56 And Rule 6(a)

C&O filed its motion to dismiss the complaint (J.A. 6) and the amended complaint (J.A. 37) on the ground that the action was brought more than three years after the cause of action accrued. The complaints alleged that, though he was actually injured on March 19, 1968, Paytner did not know until March 22, 1968, or thereafter, that he had been so injured on March 19, 1968 (J.A. 11, 14).

The District Court filed a written ruling on the motion to dismiss deciding that the action was brought within the three year period because of Rule 6(a), FRCP (J.A. 43-44, *infra*, pp. 21-23).[1]

The question whether Rule 6(a) extended the limitation of 45 U.S.C. § 56 was argued to the Court of Appeals in briefs, orally and in the Petition to Rehear *en banc*[2] as a matter of national importance affecting due process in FELA cases.

The Statement Relating To Due Process

Paynter was the yard conductor of a crew kicking cars through the switch involved to assemble train No. 95 (J.A. 156-159). As conductor it was Paynter's duty to see that the switch was properly aligned before he permitted any car to be set in motion (J.A. 189-191, 86). Failing in that duty, he suddenly saw that a particular car had begun to roll when the switch was not properly aligned and he consequently ran some 50 feet across the tracks and grabbed the switch to throw it hurriedly in order to avoid a wreck. When so doing he felt pain in his back (J.A. 190-191, 192-193).

Counsel for Paynter conceded, and the District Court correctly charged, that the condition of the switch at the time the alleged accident occurred was the issue in the case (J.A. 217, 75). The first witness called by Paynter to testify concerning that issue did not know the condition of the

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[1] That ruling also indicated that it could be said that the cause of action did not accrue until March 20, 1968, when Paynter originally claimed that he first became aware of his injury (J.A. 45). At trial after that ruling, however, Paynter repudiated that earlier contention and testified that he did in fact know of his alleged injury on the day it was claimed that it occurred and that he specifically so told his crew members of it on that day (J.A. 162-163, 121).

[2] See paragraph 2, page 2 of that petition.

switch at that time because he did not recall whether he had worked on March 19, 1968. On that account he was asked to state its condition before March 19, 1968 (J.A. 74). On objection by C&O that the testimony should be restricted to the condition of the switch on March 19, 1968 (J.A. 74) the District Court told the jury:

> "I'll overule the objection. I think it might be beneficial to the jury in determining what the condition of the switch was at the time that the alleged accident occurred.
>
> "Ladies and Gentlemen of the jury, the question you will have to decide is the condition of the switch at the time that the alleged accident occurred. Now, the condition of it before or afterwards might be beneficial to you in determining what the condition was at the time the alleged accident occurred; and for that reason, I'm gonna overrule the objection and let him answer." (J.A. 75).

Paynter offered the testimony of six fellow employees in addition to himself concerning the concededly simple issue in the case, viz., the condition of the switch on March 19, 1968. Not one of them was able to say what the condition of the switch was on that day of the alleged accident (J.A. 74, 78, 86, 122, 127, 128-129, 132, 137, 142, 148, 151, 152).

Those witnesses, however, testified uniformly that when the switch was swept and cleaned it "worked as it should," operated "very good," "gives safety to the operation," could be worked "without strain," and operated "fine" (J.A. 78-79, 94, 122, 128, 142, 149, 152). Those same men testified that when not swept and cleaned the switch did not "work as it should," was "pretty tight," could not be "operated without strain or undue exertion," was "rather hard to throw," and was " hard to throw" (J.A. 79, 94, 122, 128, 142, 149).

The true issue presented was, therefore, whether the switch was swept and cleaned on March 19, 1968, the day of the accident.

Paynter, himself, testified without contradiction that a railroad maintenance man cleaned the switches "every morning" (J.A. 161). He also offered uncontradicted and confirming proof by others that such regular morning sweeping and cleaning was a matter of "daily routine" (J.A. 147, 91, 133, 152). Paynter, himself, and his crew used the switch the morning of the alleged accident and it "worked all right then" (J.A. 159, 184-185).

Notwithstanding that uncontradicted evidence, the district court admitted testimony over the continued objection of C&O (J.A. 74-75, 77, 87-88, 90-91, 216) that for 22 years complaints had been made that the switches were not kept clean and were getting hard to throw, that it had been a tough switch to throw for 22 years (J. A. 79, 87, 93), that there was no maintenance of the switch on the night shift, that general complaints had been made about the switches for 30 years and that the switch was in improper working order on that account at all times on the night shift during that period (J.A. 127-129, 137), that during 18 years it had been necessary to strain in order to use the switch when not cleaned, that the Saturday evening before the accident it was in "foul shape" and that complaints were made during that period without any result (J.A. 147-149, 150-151).

The district court also refused to strike testimony by a witness who worked an average of only three times a week that the switch in question was not cleaned daily (J.A. 87-89).

The uncontradicted testimony was that sand in the switches was what made them "hard to throw" irrespective of type, whether ball-type or latch type, that there was no difference in the maintenance of each type, and that the

only difference in the two types of switch was that the ball type was closer to the ground requiring the operator to lean over further (J.A. 76, 78, 83, 84, 99, 100).

The district court refused to delete or to strike out the admittedly false testimony by deposition that the doctors who mistreated Paynter and aggravated his injury to the extent that it would not have been as serious and perhaps not have required surgery at all with proper treatment were C&O doctors at C&O hospitals and restricted any correction of that conceded inaccuracy to rebuttal proof that the treating doctors and hospitals were not C&O doctors and C&O hospitals. The admitted mistatement of fact remained as an issue before the jury as well as the prejudicial argument thereon by counsel (J.A. 238-239, 101-102, 106-108).

The C&O motion for directed verdict on the ground that Paynter's negligence was the sole proximate cause of the alleged injury was overruled (J.A. 194, 216, 217).

Argument to the jury by Paynter's counsel, based on the evidence objected to, included the following: that the Congress of the United States had declared to the citizens of the United States by adopting FELA that the Congress does not care what a railroad employee does wrong and that, when you sit on juries, "We don't care. He is entitled to recover" (J.A. 217); that for 35 years the C&O employees had continuously complained that the switch was not sufficiently cleaned and nothing had been done about it; that the switch had always been bad; that this was an accident waiting for 35 years to happen; that the railroad did not really care about its employees (J.A. 217-223); and, finally in closing, that the C&O had saved $600,000 over a 20 year period at the expense of its employees by not hiring enough men to keep the switches clean, which half million dollars was enough to give Paynter an adequate verdict (J.A. 224).

In its charge the district court required the jury to render special verdicts by answering six questions, notwithstanding the objection of both parties (J.A. 235, 236). Questions one through four called for yes or no findings as to C&O's negligence and, if yes, whether it contributed to the injury; as to Paynter's negligence and, if yes, whether it contributed to the injury. Question No. 5 inquired as to the percentage of Paynter's contributory negligence, if any was found. Question No. 6 demanded a finding of "the total amount of damages sustained by the plaintiff as a result of his injury" regardless of whether there was any finding whatever of liability, to which C&O expressly objected on that specific ground (J.A. 237-238, 66).

The jury found that Paynter was 20 percent the cause of his own injury and assessed the total damage at $125,540 on which judgment for $100,432 was entered (J.A. 66).

The district court declined the C&O motion to set aside the judgment and either enter final judgment for the C&O or grant a new trial for the errors assigned (J.A. 67-69). The Court of Appeals affirmed (R. 2, 3-4, Appendix B to this Petition, *infra*, pp. 18-19).

THE REASONS FOR GRANTING THE WRIT

It is nationally important to settle the conflict whether Rule 6(a), Federal Rules of Civil Procedure, extends the statutory limitation for bringing an FELA action prescribed by 45 U.S.C. § 56 as to which Courts of Appeal and State Courts are in conflict and which this Court has not specifically determined.

It is also nationally important to decide whether the Congress intended to abolish due process when it enacted FELA. We most respectfully submit that the Congress did not intend by FELA to abolish the absolute requirement for

proof of negligence as a cause of injury, even though contributing only in the slightest degree, by relevant, material and admissible evidence as a prerequisite to recovery.

The two questions presented will be separately argued.

This Action Was Barred By 45 U.S.C. § 56 Notwithstanding Rule 6(a) FRCP

The injury claimed in this case occurred on March 19, 1968. The FELA action was brought on March 22, 1971, more than three years thereafter (J.A. 3, 11, 43-44). The trial court concluded that Rule 6(a) FRCP extended that time because the last day of the three year period fell on a Saturday and the action was commenced on the following Monday (J.A. 44; Appendix B to this Petition, *infra*, pp. 21-23). The Court of Appeals for the Fourth Circuit found "no reversible error" in that ruling (Appendix B to this Petition, *infra*, pp. 18-19).

This Court had before it in *Union National Bank* v. *Lamb*, 337 U.S. 38, 93 L. Ed. 1190, 69 S. Ct. 911 (1949) the issue whether a petition for certiorari from the Supreme Court of Missouri docketed on Monday, December 13, 1948, was in time when the ninetieth day limit fixed by the revision of 28 U.S.C. § 2101, effective September 1, 1948, was a Sunday. Relying on the theory that Sunday was a *dies non* and on its decision in *Street* v. *United States*, 133 U.S. 299, 33 L. Ed. 631, 10 S. Ct. 309 (1890), the petition was accepted as timely

The opinion in *Lamb* recognized a definite conflict of decision among the Courts of Appeal regarding that effect of Sunday:

> "There is a contrariety of views whether an act which by statute is required to be done within a stated period may be done a day later when the last day of the

period fall on Sunday." (337 U.S. at 40; 93 L. Ed. at 1194, 69 S. Ct. at 912).

Of the seven decisions of Courts of Appeals cited in the footnote supporting that recognition of such conflict, five had then adopted a view contrary to the final conclusion of this Court in that case regarding the applicable effect of Sunday when it happens to be the last day of a statutory limitation.

The opinion in *Lamb* noted that Rule 6(a), FRCP gave expression to "considerations of liberality and leniency" similar to the policy of its decision in *Street* v. *United States* which the Court found applicable to the particular issue then before it, namely, the timelines of a petition for certiorari pursuant to 28 U.S.C. § 2101, inasmuch as that statute expressed no contrary policy.

The basis for the contrary view among the "contrariety of views" then existing and now continuing is well stated in *Joint Council, etc.* v. *Delaware, L&W R. Co.* (CCA 2), 157 F. 2d 417, 420 (1946) as follows:

> "Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action and to any statutes expressly applicable to such proceedings. It is not intended to modify and change existing statutes of limitation."

This Court expressly decided in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10, 85 L. Ed. 479, 483, 61 S. Ct. 422, 423-425 (1940) that the Act of June 19, 1934, authorizing promulgation of the Federal Rules of Civil Procedure "was purposely restricted in its operation to matters of pleading and court practice and procedure," by expressly providing that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigate." In deciding also that Rule 35, FRCP, relating to physical examination, was a

rule of procedure rather than one of substantive law, the test was said to be "whether a rule really regulates procedure" (312 U.S. at 14, 85 L. Ed. at 485, 61 S. Ct. at 426).[3]

In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965), this Court undertook to examine the fundamental purposes underlying the objectives sought to be attained by statutes of repose and which render them preeminent rather than subject to being extended, waived or tolled. Asserting that the basic inquiry always is the congressional purpose and that mere classifications as "substantative" or "procedural" are not alone enough to determine whether a particular limitation may or may not be extended, the opinion appears to establish that the essential distinction, decisive "in the interests of justice" as to which objective outweighs the other, is whether the litigant has "slept on his rights" or has been prevented from asserting them. (380 U.S. at 428-429, 13 L. Ed. 2d at 946, 85 S. Ct. at 1055).

The general conflict of opinion, in varying aspects of the issue, continues in both state and federal courts.[4]

The specific question at bar is whether Rule 6(a), FRCP applies to 45 U.S.C. § 56. The answer is not so definitely settled by this Court that no conflict remains. The conuclusion of the Second Circuit in *Joint Council, etc.* v. *Delaware,*

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[3] Justice Frankfurter, dissenting with whom Justices Black, Douglas and Murphy agreed, was of the following definite opinion:

> "Plainly the Rules are not acts of Congress and can not be treated as such. * * *, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality." (312 U.S. at 18, 85 L.Ed. at 487, 61 S.Ct. at 428)

[4] *Bowling* v. *Webb Gas Co., Inc. of Lebanon* (Mo.), 505 S.W.2d 39 (1974); *Bellegarde Custom Kitchens* v. *Leavitt* (Me.), 295 Atl. 2d 909 (1972); *Davis* v. *U.S. F&G Co.* (Ga.), 167 S.E.2d 214 (1969); *Brown* v. *Porter* (Mich.), 163 N.W.2d 709 (1968); *Romaine* v. *State Farm Mut. Auto. Ins. Co.* (Nev.), 485 P.2d 102 (1971); *Aboussie* v. *Aboussie* (C.A. 5), 441 F.2d 150, 157 (1971).

L&W R. Co., supra, that the rule does not so apply is the more reasonable and logical in the opinion of this petitioner. It is, however, important that the conflict be finally resolved, regardless of which decision the Court may make. The petition should therefore be granted, we respectfully submit.

Certiorari Should Be Granted To Satisfy Due Process

It is important to maintaining confidence in the judicial system that due process be meticulously observed. This Court has persisted in granting certiorari for that purpose, particularly to insure that a new trial is granted when it is probable that the prior one did not offer due process: in *Neil* v. *Biggers,* 409 U.S. 188, 84 L. Ed. 2d 401, 93 S. Ct. 375 (1972), to determine "whether the identification procedure violated due process" because "unnecessarily suggestive and conducive to irreparable mistaken identification"; in *Inman* v. *Baltimore & O. R. Co.,* 361 U.S. 138, 4 L. Ed. 2d 198, 89 S. Ct. 242 (1959), to ascertain whether the evidence was sufficient to establish "that negligence on the part of the railroad could have played" a part in petioner's injury; in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937), to discover whether due process was violated "when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record"; in *Montana* v. *Kennedy,* 366 U.S. 308, 66 L. Ed. 2d 313, 81 S. Ct. 1336 (1961), because of the harshness of decision when it was "readily apparent" that a Rule of the FRCP was not applicable; in *Perma Life Mufflers* v. *International Parts,* 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968), because the lower court rulings seemed to threaten the effectiveness of private action to enforce anti-trust procedure; in *Washington* v. *U.S.,* 357 U.S. 348,

2 L. Ed. 2d 1368, 78 S. Ct. 1373 (1958) to determine the sufficiency of evidence; in *Williams* v. *Lee*, 358 U.S. 217; 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959), on account of doubt as to state court jurisdiction; in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 93 L. Ed. 497, 69 S. Ct. 413 (1949), to determine the sufficiency of evidence.

The insufficiency and inadmissibility of evidence in this trial constitute such departure from the accepted and usual course of judicial proceedings as to preclude due process. The failure to correct such error on appeal, at the least by ordering a new trial under proper conditions, calls for appropriate supervision by this Court.

The sole issue in this case was conceded to be the condition of the switch at the time of the accident on March 19, 1968 (J.A. 75, 217). The sole duty of the C&O was to exercise ordinary care to have the switch in reasonably safe condition at that time. The testimony offered by Paynter established without dispute that the condition of the switch at any moment of time depended altogether on whether it was cleaned and swept and none of the six fellow-workers called by Paynter knew its condition in that regard at the time of the accident (J.A. 74, 78-79, 86, 94, 122, 127-129, 132, 137, 142, 148-149, 151-152). It is thus obvious that a switch whose condition, good or bad, is dependent upon whether it is swept or unswept clean of sand is not a facility of such continuing stable condition that testimony concerning its condition before and after an accident is admissible without concomitant reference to that essential factor admittedly determinative of its status at the particular time.

The uncontradicted proof offered by Paynter was that it was "daily routine" for the switch involved to be swept clean every morning (J.A. 161, 147, 91, 133, 152) and that when swept its condition was proper (J.A. 78-79, 94, 122, 128, 142, 149, 152). Paynter, himself, was unable to say whether

it had or had not been swept the morning of his accident, but he did say that he and his crew had used it that morning (J.A. 159) and that "it worked all right then" (J.A. 184-185). The presence of sand was entirely an assumption by Paynter rather than an observed fact (J.A. 160). There was no evidence whatever from actual observation that there was sand in the switch at the time of the alleged accident.

The repeated inadmissible testimony that the switches on the yard had not been kept clean and had been complained of without any result for 30 years or more was obviously rendered especially prejudicial by the district court's specific direction to the jury, upon objection, that "the condition of it (the switch) before or afterwards might be beneficial to you in determining what the condition was at the time the alleged accident occurred" (J.A. 75, 79, 87, 93, 127-129, 137, 147-149, 150).

The district court refused to strike out, but left as a prejudicial issue of fact for the jury to consider, the admittedly false testimony that the doctors claimed to have mistreated Paynter and thereby increased the severity and duration of his injury were C&O doctors in C&O hospitals for whom the C&O was responsible (J.A. 238, 184, 101-108).

The Court also insisted upon special verdicts, objected to by both parties, and refused over specific objection by C&O, to condition question No. 6, the fixing of a dollar value on the total injury claimed to have been suffered by Paynter, upon first finding that negligence of the C&O was a cause of the injury (J.A. 237-238, 235-236, 66).

The argument of Paynter's counsel, outlined above in the related Statement of the Case, was highly inflammatory and beyond the scope of relevant, material and admissible facts, that deliberately appealed to conjecture, surmise and sympathy as opposed to evidence to which the jury's consideration should have been restricted. That persuasive effort

was supported by a heavily weighted charge which emphasized the inferences permitted to be drawn improperly from evidence "produced in this Courtroom" because that evidence included the inadmissible testimony concerning the condition of the switch for 30 years or more and from circumstantial evidence justified by the jury's "own experiences" (J.A. 53, 54, 55).

The failure to recognize the insufficiency of the evidence in this case, and particularly the failure in any event to grant a new trial in order to ascertain a fair result without such accumulation of prejudicial errors, clearly violated due process and warrant the granting of this petition.

CONCLUSION

For the reasons hereinabove stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

1. United States Code, Title 45, § 56:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

2. United States Code, Title 28, Rule 6(a), Federal Rules of Civil Procedure:

"In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), 'legal holiday' includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held."

APPENDIX B

1. The order of the Fourth Circuit Court of Appeals on the petition to rehear *en banc:*

United States Court of Appeals
For The Fourth Circuit

No. 74-1210

Earl G. Paynter, Jr.,

Appellee,

vs.

The Chesapeake and Ohio Railway Company,

Appellant.

Filed Dec. 6, 1974

William K. Slate, II
Clerk

Order

Upon consideration of the petition for rehearing, with its suggestion of a rehearing *en banc,* and with the concurrence of Judge Bryan and Judge Craven, no member of the Court having requested a poll of the Court,

IT IS ORDERED that the petition for rehearing be, and it is hereby, denied.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

A True Copy, Teste:

William K. Slate, II, Clerk
By /s/ Faye Chlome
Deputy Clerk

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2. The *Per Curiam* opinion of the Fourth Circuit Court of Appeals:

United States Court Of Appeals
For The Fourth Circuit

No. 74-1210

Earl G. Paynter, Jr.,

Appellee,

versus

The Chesapeake and Ohio Railway Company,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville.
James C. Turk, District Judge

Argued October 4, 1974 Decided October 24, 1974

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, and Craven, Circuit Judge.

Aubrey R. Bowles, Jr., (Aubrey R Bowles, III, on brief) for Appellant; Raymond H. Strople (Willard J. Moody and Bernard Miller on brief) for Appellee.

Per Curiam:

On consideration of the record, briefs and oral argument, we find no reversible error. We find sufficient evidence to take the case to the jury.

Affirmed.

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3. The final judgment of the United States District Court for the Western District of Virginia (J.A. 69):

In The United States District Court

For The Western District Of Virginia

Charlottesville Division

Civil Action No. 71-C-6-C

Earl G. Paynter, Jr.,

v.

The Chesapeake and Ohio Railway Company,

Order

The defendant in this case, by counsel, has filed a motion pursuant to Rules 50 & 59 asking the court to set aside the verdict of the jury in this case and to enter final judgment in favor of the defendant or in the alternative, to grant the defendant a new trial.

The court having considered said motion, doth overrule the same, the effect of which is to re-affirm the judgment order heretofore entered by the court on November 28, 1973.

Enter: December 12, 1973

James C. Turk
Chief U.S. District Judge

Clerk's Office, U.S. Dist. Court
at Charlottesville, Va.
Filed December 13, 1973

Joyce F. Witt, Clerk

By: Virginia P. Harris
Deputy Clerk

A True Copy, Teste:
Joyce F. Witt, Clerk

By: Virginia P. Harris
Deputy Clerk

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4. The written ruling of the United States District Court for the Western District of Virginia of the motion to dismiss (J.A. 43-46):

Clerk's Office U.S. Dist. Court
at Charlottesville, Va.

Filed June 15, 1973

Joyce F. Witt, Clerk

By: /s/ Virginia P. Harris
Deputy Clerk

In The United States District Court
For The Western District Of Virginia
Charlottesville Division

Civil Action Number 71-C-6-C

Ruling On Motion To Dismiss

Earle G. Paynter,

Plaintiff,

vs.

Chesapeake and Ohio Railway,

Defendant.

* * *

Ruling On Motion To Dismiss

Plaintiff was injured on March 19, 1968. Plaintiff filed his suit on March 22, 1971. The time limit allowed under FELA is three years as required by 45 U.S.C.A. § 56. Rule 6 of the Federal Rules of Civil Procedure provides as follows:

> In computing any period of time prescribed or allowed by these rules, by local rules of any district court, by order of court, or by any applicable statute, *the day of the act, event, or default from which the designated period of time begins to run shall not be counted. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day, which is not a Saturday, a Sunday, or a legal holiday.* (Emphasis added)

Under Rule 6, the designated period of time did not begin to run until the date following the accident, March 20, 1968.

Three years from that date, March 20, 1971 fell on a Saturday, and the following day was Sunday. Therefore, the court finds that plaintiff's suit, filed on Monday, March 22, 1971, falls within the statutory three-year period.

It has been held that Rule 6 of the Federal Rules of Civil Procedure is applicable to pleadings and statutes of limitations and that in computing time the first day should be excluded and the last day included. *Miller* v. *Daybrook-Ottawa Corp.*, 291 F. Supp. 896 (1968).

In *Rutledge* v. *Sinclair Refining Co.*, 13 F.R.D. 477 (S.D. N.Y. 1953), the court said at 478 that "the basic issue is whether Rule 6(a) is applicable to a Federal statute of limitation when the last day of the period prescribed by it falls on a Sunday. (Rule 6 at that time did not include Saturdays). The court specifically held that the statute of limitations under FELA was controlled by the provisions of Rule 6 of the Federal Rules of Civil Procedure.

* * *

Accordingly, for the above-stated reasons, it is hereby ordered and adjudged that defendant's motion to dismiss on the ground of statute of limitations is overruled and denied.

* * *

Enter:

Ted Dalton
U.S. Chief District Judge

June 12, 1973

A True Copy, Teste:

Joyce F. Witt, Clerk

By: /s/ Virginia P. Harris
Deputy Clerk